



Republican Policy Committee

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The Helms-Dole Amendment to H.R. 1868 The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act

*(Prepared by the Republican Staff
of the Committee on Foreign Relations)*

Among the items likely to be offered to the Foreign Operation, Export Financing, and Related Programs Appropriation bill for FY 1996 (H.R. 1868) will be an amendment by Senator Helms-Dole to strengthen sanctions against the communist government of Fidel Castro in Cuba. That amendment, which is a modified version of a free-standing bill introduced on February 9, 1995, by Senator Helms (S. 381), includes the following features:

The Amendment Strengthens International Sanctions Against the Castro Government.

- Urges the President to seek, in the U.N. Security Council, an international embargo against the Castro dictatorship.
- Authorizes the President to furnish assistance to support democracy-building efforts, assist victims of political repression, and facilitate visits of international human rights monitors.
- Prohibits loans, credits, or other financing to be extended knowingly by a U.S. national or agency to any person to finance transactions involving U.S. property confiscated by the Cuban government; the President may suspend this provision during a transition government and end it for a democratic government.
- Instructs U.S. executive directors to international financial institutions to oppose Cuban membership until the President determines that a democratically elected government is in power. If, prior to that time, such an institution approves a loan to Cuba, the U.S. shall withhold payment to that institution in an amount equal to the amount of the loan, unless the loan is to a transition government and it contributes to a stable foundation for a democratically elected government to take power.

- Conditions U.S. aid to former Soviet states on the conduct of their economic relationship with Cuba on market terms; expresses strong congressional disapproval of Russian credits to Cuba in exchange for the use of intelligence facilities targeted at the United States; and requires the President to withhold aid to any former Soviet state by an amount equal to the sum of assistance and credits for intelligence facilities in Cuba, unless the President certifies that this aid is important to U.S. national security and that the Russians are not sharing intelligence with the Cubans. (U.S. aid for humanitarian programs and democratic political reform, among other programs, are exempted.)
- Instructs the Director of the U.S. Information Agency to implement the conversion of Television Marti to Ultra-High Frequency (UHF) broadcasting, as previously funded by Congress.
- Expresses the sense of Congress that the President should, before reinstituting family remittances and family travel to Cuba, insist that the Cuban government permit the unfettered operation of small businesses, end the sanction for refugee departure from the island, release political prisoners, and recognize the right of association.
- Requires reports to Congress on commerce with, assistance to, and military relationships with Cuba by other foreign countries.
- Tightens enforcement of existing prohibitions on the importation of Cuban sugars, syrups, and molasses through a certificate of origin requirement and forfeiture penalties for violations (consistent with NAFTA and GATT obligations).
- Authorizes the President to implement a fully-reciprocal exchange of news bureaus between the United States and Cuba, provided that such an exchange meets certain conditions, including that Cuba allow free, unrestricted and uninhibited movement on the island to American news organizations.

The Amendment Supports Transition to a Free and Independent Cuba.

- Instructs the President to develop a plan for providing support to the Cuban people during a transition and democratically-elected government.
- Authorizes assistance during the period of a transition government for food, medicine, medical supplies, and equipment, and assistance to meet emergency and basic humanitarian needs of the Cuban people.
- Authorizes the President to provide assistance to a democratically elected government to promote free market development and private enterprise, including (1) EXIM Bank financing and guarantees, (2) OPIC financial support, and (3) assistance provided by the Trade and Development Agency, and to encourage investment in Cuba.

- Authorizes the President to suspend both the economic embargo and the right of action provided under this Act (see below) against a future transitional government in order to contribute to a foundation for a democratically elected government to take power.
- Authorizes the President to terminate the embargo upon a determination that a democratically elected government is in power.
- Requires a report and consultations on trade and investment, once a democratically elected government is in power, on U.S. trade objectives with Cuba, including the extension of most-favored-nation status, Cuba's designation as a beneficiary developing country under the Trade Act of 1974 or as a Caribbean Basin Initiative beneficiary, and other free trade arrangements, including Cuba's accession to NAFTA.
- Conditions U.S. assistance and support in international financial institutions to any post-Castro government (transition or democratically-elected) on its commitment to, establishment of, and implementation of, a procedure to return or compensate certified American claimants who had their property taken by Castro and who were U.S. citizens at the time of the taking, unless the President determines that it is vital to the U.S. to waive these conditions in order to contribute to a stable foundation for a democratically elected government in Cuba; and requires a report to Congress assessing the total number of property claims held by U.S. nationals against Cuba, assistance the U.S. could provide to Cuba to establish property dispute resolution mechanisms, the types of support the U.S. could provide to U.S. property claimants, and areas requiring further congressional action.

The Amendment Provides Protection Against Confiscatory Takings of American Property.

- This Title seeks to protect the interests of U.S. nationals whose property was wrongfully confiscated under the Castro regime by making persons or entities that knowingly and intentionally traffic in confiscated U.S. properties in Cuba liable for damages in U.S. District Court. The intent is to deter third-country nationals from seeking to profit from wrongfully confiscated properties and to deny Castro a source of hard currency.
- Establishes a private civil right of action for any U.S. national having ownership of a claim to commercial property confiscated by Cuba against a person or entity who is knowingly benefitting from the use of such confiscated property without the authorization of the American claimant. Residential claims are restricted to those properties the claim to which is held by a certified claimant or where the home is occupied by a senior official of the government or the communist party. [NOTE: This is a grant of subject matter jurisdiction to U.S. courts and does not require a particular outcome. It does not require a property claimant to use this remedy; it is an option available to U.S. nationals who can satisfy the court's jurisdictional requirements that they have a valid trafficking claim.] Additional features of the civil right of action:
 - Provides a six-month period between this provision's enactment and the ability of

a claimant to use this remedy.

- ▶ Claimant may seek damages in the amount certified by the Foreign Claims Settlement Commission (if a certified claimant), or the fair market value at time of confiscation or at the time the claim is filed (whichever is greater).
- ▶ Requires the court (1) to recognize a strong presumption in favor of the amount as certified by the Foreign Claims Settlement Commission, and (2) to accept the certification as conclusive proof of ownership. For all others, both the amount and proof of ownership must be proven to the court's satisfaction.
- ▶ Requires an affirmative duty to notify a potential defendant about the claim to the confiscated property and provides treble damages only after an additional notice has been given.
- ▶ Requires that the claim meet a minimum amount in controversy of \$50,000, exclusive of costs.
- ▶ Requires service of process in accordance with existing law and rules, including that any actions brought against a state entity be in accordance with the Foreign Sovereign Immunities Act (except that no default judgments are allowed against a Cuban government both recognized by and with which the U.S. has diplomatic relations, unless that government has been given the opportunity to resolve or respond to the dispute and the plaintiff has established his ownership to the court's satisfaction).
- ▶ Provides that certified claimants who use this right of action are not denied U.S. Government espousal if they do not receive full compensation; but reduces any responsibility to espouse by the amount of any recovery and discharges the U.S. from responsibility with respect to the certified claim if the claimant receives equal or greater compensation through this right of action.
- ▶ Suspends upon the determination that a transition government is in power and terminates the right of action upon a presidential determination that a democratically elected government is in power in Cuba, except for actions commenced before the determination. (President retains authority to nullify claims under the authority of the International Emergency Economic Powers Act, recognized by the Supreme Court in *Dames & Moore v. Reagan* (1981).)
- Does not require or authorize the U.S. Government to espouse the claims of naturalized persons in any settlement with the Cuba government.
- Protects the settlement amount of all claims certified by the Foreign Claims Settlement Commission by denying a claim to, participation in, or interest in any settlement proceeds by (1) any U.S. national who was eligible to file under the International Claims Settlement Act of 1949 but did not do so, (2) any U.S. national who was not eligible to file under the International Claims Settlement Act, or (3) any Cuban national, including

any Cuban government, its agencies and instrumentalities.

The Amendment Would Not Subject the Claims of Naturalized Citizens to Espousal by the United States in Any Future Settlement with Cuba and Thereby Dilute the Claims of the Existing Certified Claimants.

- Nothing in Helms-Dole requires or authorizes the President to espouse (which means the adoption of the private citizen's claim against a foreign government as state-to-state action) the claims of naturalized citizens in any settlement with Cuba. Rather, the Helms-Dole amendment specifically states that the U.S. *only* has espousal responsibility for the existing certified claimants — i.e., those 5,911 claimants certified pursuant to statute (Title V, International Claims Settlement Act) before the closing of the claimant pool in 1972 — and that only they shall have an interest in any such settlement.
- Post-confiscation nationals (naturalized citizens) are entitled only to a limited right of civil action to sue in U.S. courts those who can be found in the United States who traffic in their commercial property after having been given adequate notice to stop and where the amount in controversy is \$50,000 or more.
- The opening of a nation's courts to private judicial remedies against a person over whom it exercises domestic jurisdiction does not constitute "state espousal" of a claim.
- It is a well-established principle that nations may prescribe rules of law regarding activities which have a substantial effect on that nation, even if those activities are outside a nation's borders.
- The adverse impact of "trafficking" in confiscated property belonging to Americans furnishes a basis, of a kind well recognized in international law, for the United States to create domestic remedies regardless of the time at which the victim of confiscation acquired U.S. nationality. ("Trafficking," as defined in Helms-Dole, means the use of or benefit from a confiscated property without the consent of the real owner.)
- The United States has opened its courts to foreign nationals for almost 200 years, starting with the Alien Tort Statute. In 1992, the U.S. opened its courts to foreign nationals for actions against other foreign nationals for acts of torture committed outside the territory of the United States.
- Helms-Dole does not accept the concept of *second class citizenship* in providing a private judicial remedy in the courts of the United States. American citizens (both those born in the United States and those who are naturalized) have the right to seek relief for federally-recognized offenses.

- Providing naturalized citizens a legal remedy in U.S. courts for Castro's wrongful confiscations is entirely appropriate.

The Amendment Will Not Flood U.S. Courts with Law Suits.

- In order to get into court to proceed under the right of action, a plaintiff must (1) be a U.S. national, (2) have sufficient evidence to establish, to the court's satisfaction, that he has stated a justiciable claim, (3) have provided specific notice to any potential defendant, (4) have a claim valued at \$50,000 or more (exclusive of costs) and be able to satisfy a court that the claim is so valued, (5) prove that the defendant is knowingly and intentionally "trafficking", and (6) have a defendant properly before the court's jurisdiction (having met all the 5th Amendment due process requirements).
- The primary benefit of the right of action is as a deterrent to would-be investors in Cuba. Few actions are expected to be brought under this Amendment because both parties must be sufficiently present in the U.S. to sustain jurisdiction of our courts. CBO, in its estimate of the House bill, stated that "we expect only a few cases would actually go to trial . . ." Helms-Dole is narrower than the House provision.
- To ensure that our judicial resources are directed only towards matters where there is a significant economic interest, Helms-Dole includes an amount in controversy requirement that any claim equal \$50,000 or more (not including costs).
- For 200 years, the U.S. has opened its courts to foreign nationals who claim to be the victim of torts committed against international law. The U.S. can certainly accommodate its own citizens.

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